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PUBLIC BANK BHD

v.

CHOONG YEW WAH

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
MAH WENG KWAI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: P-03(IM)-169-11-2012]

C

26 FEBRUARY 2014

BANKRUPTCY: *Discharge - Discharge of bankrupt - Appeal against - Report of Director General of Insolvency ('DGI') - Whether there was reference to respondent's failure to comply with s. 16(2)(b) Bankruptcy*

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Act 1967 - Whether omission to do so rendered DGI's report incomplete - Whether report lacked details of reasonable justifications for discharge - Whether there was consideration by DGI that respondent had numerous creditors - Whether discharge of bankrupt had taken interest of creditors - Whether there was dereliction in DGI's statutory duty - Whether

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appropriate case to allow discharge - Bankruptcy Act 1967, s. 33

The respondent was adjudged a bankrupt through an application by the appellant for debt owed to it in the bankruptcy court. The appellant thereafter lodged a complaint with the Director General

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of Insolvency ('DGI') of RM732,024.97. This proof of debt was accepted by the DGI as reflected in the DGI's report. The respondent, however, applied to the court for a discharge of his bankruptcy under s. 33 of the Bankruptcy Act 1967 ('the Act'). The Deputy Registrar sustained the application and made the

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order of discharge. The appellant unsuccessfully appealed to the judge in chambers as the judge affirmed the decision of the Deputy Registrar. Hence, this appeal. The appellant contended that the respondent had failed to file his statement of claim within the time period prescribed in s. 16(2)(b) of the Act and had

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committed an offence as set out in s. 16(3) of the Act. Further, there was no consideration by the DGI, Deputy Registrar and the judge that the respondent had numerous creditors with debts amounting to RM1,614,658.87.

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Held (allowing appeal)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) The DGI's report plays an important part. The court relies heavily on it to exercise its discretion. The court is also duty-bound to examine the DGI's report and determine whether the recommendation made is based on a thorough investigation of the affairs of the bankrupt and the interests of the creditors. The court's role cannot be a rubber stamp of the DGI's recommendation. If the court finds the DGI's report to be lacking in details or reasonable justifications, the court is duty-bound to ignore it and cannot allow the bankrupt to take advantage of such deficiencies. Further, ss. 17 and 34 of the Act clearly empowers the DGI to carry out thorough investigation of the estate of the bankrupt and any failure to carry out such a statutory task would result in a dereliction of his statutory duty. (para 14)

(2) In the two reports made by the DGI dated 18 June 2012 and 21 June 2012, there was no reference to the respondent's failure to comply with s. 16(2)(b) of the Act, hence there was no explanation as to why such non-compliance was ignored by the DGI. In view of this omission, the respondent in fact relied on it to submit that there had not been any breach of s. 16(2)(b) as the DGI had failed to mention such offence. By this omission, the DGI's report was incomplete. The court under s. 33(4) of the Act is required by law to suspend any discharge. On this ground alone, the appeal ought to be allowed. (para 15)

(3) There was no explanation by the DGI as to how the discharge of the respondent had taken the interest of the other creditors into account bearing in mind that the total sum of the indebtedness was RM1,614,658.87 (of which the appellant's share was RM732,024.97) and all that the respondent was required to pay was RM500 per month for 24 months, totalling only RM12,000 to be shared among nine creditors. Further, there was no report on the respondent's earning capability. There were therefore merits in the appellant's complaints. (para 16)

(4) The courts must be mindful that the DGI's report must be complete and stand up to reasonable scrutiny for the simple reason that the DGI holds a pivotal position in that he has the power to investigate the reason for the bankrupt's insolvency and his financial standing since the bankruptcy. The DGI and the courts must also be sensitive to the public perception on bankruptcy law in the country. The interest of the bankrupt as an individual and the interest of the public and commercial reality at large must be weighed up for the simple reason that the society at large must not have the impression that being a bankrupt is not a serious matter (*Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals*, refd). Therefore, this was not an appropriate case to allow a discharge asked for by the respondent. (paras 17 & 18)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah diisytiharkan sebagai seorang bankrap melalui permohonan yang dibuat oleh perayu ke atas hutang responden kepadanya di mahkamah. Perayu kemudiannya membuat aduan kepada Ketua Pengarah Insolvensi ('KPI') untuk RM732,024.97. Bukti hutangnya telah diterima oleh KPI seperti yang tergambar dalam laporan KPI. Responden, walau bagaimanapun, memohon kepada mahkamah untuk dilepaskan daripada kebankrapannya di bawah s. 33 Akta Kebankrapan 1967 ('Akta'). Timbalan Pendaftar membenarkan permohonan dan membuat perintah pelepasan. Rayuan perayu kepada hakim dalam kamar terhadap keputusan tersebut tidak berjaya kerana hakim telah mengesahkan keputusan Timbalan Pendaftar. Oleh itu, rayuan ini. Perayu menghujahkan bahawa responden telah gagal memfailkan pernyataan tuntutan dalam tempoh waktu yang telah ditetapkan dalam s. 16(2)(b) Akta dan telah melakukan kesalahan seperti yang dinyatakan dalam s. 16(3) Akta. Tambahan pula, KPI, Timbalan Pendaftar dan hakim telah gagal mengambil dalam pertimbangan bahawa responden mempunyai beberapa pemiutang dengan hutang berjumlah RM1,614,658.87.

Diputuskan (membenarkan rayuan)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Laporan KPI memainkan peranan penting. Mahkamah bergantung kepadanya untuk mengunakan budi bicaranya. Mahkamah juga berkewajipan untuk memeriksa laporan KPI

dan menentukan sama ada cadangan yang dibuat adalah berdasarkan siasatan menyeluruh hal ehwal si bankrap dan kepentingan pemiutang. Peranan mahkamah tidak boleh menjadi cap mohor cadangan KPI. Jika mahkamah mendapati bahawa laporan KPI kekurangan maklumat atau justifikasi munasabah, mahkamah berkewajipan untuk mengenepikannya dan tidak membenarkan si bankrap mengambil kesempatan daripada kekurangan tersebut. Selanjutnya, ss. 17 dan 34 Akta memberi kuasa kepada KPI untuk menjalankan siasatan sepenuhnya terhadap estet si bankrap dan kegagalan untuk melaksanakan tugas statutori itu akan menyebabkan pengabaian tanggungjawab statutorinya.

(2) Dalam dua laporan yang dibuat oleh KPI bertarikh 18 Jun 2012 dan 21 Jun 2012, tiada rujukan kepada kegagalan responden untuk mematuhi s. 16(2)(b) Akta, oleh itu tiada penjelasan diberikan berkenaan mengapa ketidakpatuhan tersebut diabaikan oleh KPI. Memandangkan terdapat pengabaian tersebut, responden telah bergantung kepadanya untuk menghujahkan bahawa tiada pelanggaran s. 16(2)(b) kerana KPI gagal menyebut kesalahan tersebut. Akibat pengabaian tersebut, laporan KPI tidak lengkap. Di bawah s. 33(4) Akta, mahkamah diperlukan oleh undang-undang untuk menangguhkan apa-apa pelepasan. Atas alasan ini, rayuan harus dibenarkan.

(3) Tiada penjelasan oleh KPI bagaimana pelepasan responden telah mengambil kepentingan pemiutang yang lain dalam pertimbangan memandangkan jumlah keseluruhan hutang adalah RM1,614,658.87 (di mana RM732,024.97 adalah bahagian perayu) dan responden hanya perlu membayar RM500 sebulan untuk 24 bulan dikongsi dengan sembilan pemiutang yang lain. Selanjutnya, tiada laporan berkenaan keupayaan pendapatan responden. Oleh itu, terdapat merit dalam aduan yang dibuat oleh perayu.

(4) Mahkamah haruslah prihatin bahawa laporan KPI adalah lengkap dan boleh berdiri untuk diperiksa dengan rapi dan munasabah kerana KPI memegang peranan penting di mana beliau mempunyai kuasa untuk membuat siasatan ke atas insolvensi si bankrap dan kedudukan kewangannya sejak kebankrapannya. KPI dan mahkamah juga harus peka kepada persepsi awam berkenaan undang-undang kebankrapan di dalam negara ini. Kepentingan si bankrap sebagai seorang

A individu dan kepentingan orang awam dan realiti komersial pada umumnya mesti dipertimbangkan kerana masyarakat tidak harus diberikan tanggapan bahawa menjadi seorang yang bankrap bukan perkara yang serius. (*Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals*, dirujuk). Oleh
B itu, ini bukanlah kes yang sesuai untuk membenarkan pelepasan yang dituntut oleh responden.

Case(s) referred to:
Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals [2010] 8 CLJ 680 CA ***(refd)***
C *Re Ng Seng Heng, Ex P Mayban Securities Sdn Bhd [2003] 7 CLJ 252 HC* ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 16(2)(b), (3), 17, 33(4), 34

D *For the appellant - Adi Harman Mawardi; M/s Tan Lok Heah & Assoc*
For the respondent - In person

[Editor's note: For the High Court judgment, please see Per: Choong Yew Wah; Ex-parte: Pacific Bank Bhd & Satu Lagi [2012] 1 LNS 988.]

E *Reported by Suhainah Wahiduddin*

JUDGMENT

F **David Wong Dak Wah JCA:**

Introduction

[1] This is an appeal against the decision of the High Court in
G which the learned judge dismissed the appeal by the appellant against the Deputy Registrar's decision in allowing the application of the respondent for an order of discharge under s. 33 of the Bankruptcy Act 1967 ('the Act').

H **[2]** We heard the appeal and after due consideration of respective submissions of counsel, we allowed the appeal and now give our reasons.

Factual Background

I **[3]** The respondent was adjudged a bankrupt on 11 October 2001 through an application by the appellant for debt owed to it in the bankruptcy court.

[4] The appellant thereafter lodged a claim with the Director General of Insolvency (DGI) of RM732,024.97. This proof of debt was accepted by the DGI as reflected in item 2 of the DGI's report dated 18 June 2012.

[5] The respondent on 19 April 2012 applied to the court for a discharge of his bankruptcy and on 31 July 2012 the Deputy Registrar sustained the application and made the following order:

> Bankrap hendaklah dengan ini dilepaskan dengan syarat beliau membuat bayaran sebanyak RM500.00 sebulan kepada jabatan Insolvensi Malaysia selama 24 bulan mulai 01-8-2012 hinga 31-07-2014 mengikut s. 33(4) Akta Kebankrapan 1967 dan sekiranya gagal, perintah pelepasan ini akan ditarik balik.

[6] The appellant unsuccessfully appealed to the Judge in Chambers as the learned judge affirmed the decision of the Deputy Registrar on 12 October 2012. It is this decision which this appeal is concerned with.

Our Grounds Of Decision

[7] Our starting point is s. 33 of the Act which reads as follows:

> Sec 33:
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> (1) A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and the court shall appoint a day for hearing the application.
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> (3) On the hearing of the application the court shall take into consideration a report of the Director General of Insolvency as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.
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> (4) In all cases where it is proved to the satisfaction of the court that the bankrupt has committed any offence under this Act or under any written law repealed by this Act or under section 421, 422, 423 or 424 of the Penal Code [Act 574] the court shall unless for special reasons it otherwise determines either refuse the discharge or suspend the operation of the order until a dividend of not less than fifty

A per centum has been paid to the creditors, and on proof of any of the facts mentioned in subsection (6) the court shall either:

(a) refuse the order; or

B (b) suspend the operation of the order for a specified time; or

(c) suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors; or

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(d) grant an order of discharge subject to such conditions as aforesaid.

The powers of suspending and attaching conditions to a bankrupt's discharge may be exercised concurrently.

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[8] The complaints of the appellant are two fold. Firstly, there was no consideration by the DGI, Deputy Registrar and the learned judge of the allegation that the respondent had committed an offence under the Act. Secondly, there was also no E consideration of the fact that the respondent had numerous creditors with debts amounting to RM1,614,658.87.

[9] We shall deal with the first complaint. It is the contention of the appellant that the respondent had failed to file his F statement within the time period prescribed in s. 16(2)(b) of the Act which reads as follows:

The statement shall be so submitted within the following times:

(b) if the order is made on the petition of a creditor, within G twenty-one days from the date of the order.

It is undisputed that the respondent had failed to comply with s. 16(2)(b) in that he filed his statement only on 5 August 2004 which is some 17 months late.

H **[10]** Learned counsel for the appellant then submitted that the respondent had committed an offence as set out in s. 16(3) of the Act which reads as follows:

If the debtor fails without reasonable excuse, proof whereof shall I lie on him, to comply with the requirements of this section he shall be guilty of a contempt of Court and may be punished accordingly.

[11] The courts' view on the significance of such non-compliance can be gathered in the context of an application for discharge the case of *Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals* [2010] 8 CLJ 680; [2011] 2 MLJ 218 where this court through the judgment of Ramly Ali JCA (as he then was) had this to say:

> [37] Section 33(4) of the Act *inter alia* provides that where a bankrupt has committed any offence under the Act, the court shall either refuse the discharge or suspend the order until a dividend of not less than 50% has been paid to the creditors but the DGI may for special reasons extend the time by order made under his hand, to be forthwith filed, and recording the reasons for such an extension. In the present case the adjudication order was made on 23 November 2000, on the bankrupt's own application (not by any creditors). The bankrupt is required under s. 16(2)(a) of the Act to submit his statement of affairs with the DGI within seven days from his being adjudged bankrupt. However, the bankrupt in the present case only filed his statement of affairs with the DGI on 21 February 2001, about three months after the date of the adjudication. There is no mention in the DGI's reports that an extension of time has been granted to the bankrupt to file the statement of affairs out of time or any reasonable explanation or excuse by the bankrupt for his delay in filing the statement of affairs in the DGI's reports; and yet the DGI in his reports states that the bankrupt did not commit any offence under the Act.
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> [38] Section 16(3) of the Act provides that if the bankrupt fails, without reasonable excuse, proof whereof shall lie on him, to comply with the requirement, he shall be guilty of contempt of court and may be punished accordingly. The court has treated such non-compliance of s. 16(3) of the Act as very serious and had imposed custodial sentence on the bankrupt (see: *Dato' Abdullah Hishan Hj Mohd Hashim v. Sharma Kumari Shukla (No 4)* [2001] 5 CLJ 400). Thus, there is no doubt that a contempt of court action under s. 16(3) is an offence under the Act. The bankrupt in this present case has clearly committed an offence under s. 16(2) punishable under s. 16(3) of the Act. Yet, the DGI in his reports had the audacity to state that "the bankrupt did not commit any offence under the Act".
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> [39] That being the case, the court should have refused the conditional discharge or suspend the operation of the order until a dividend of not less than 50% has been paid to the creditors, as clearly stipulated by the first limb of s. 33(4) of the Act. There is no special reason otherwise determined by the court on this matter and the 1% dividend declared was manifestly below the minimum requirement of 50% under the said provisions.

[12] Similar sentiments were expressed in *Re Ng Seng Heng, Ex P Mayban Securities Sdn Bhd* [2003] 7 CLJ 252 where Zulkefli Ahmad Makinudin J (as he then was) had this to say:

> Non-compliance With The Requirement Of The Law
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> Section 33(4) of the Act *inter alia* provides that where a bankrupt has committed any offence under the Act, the court shall either refuse the discharge or suspend the order until a dividend of not less than 50% has been paid to the creditors. Paragraph 2 of the OA's report states that the debtor's statement of affairs was filed by the bankrupt on 13 June 2002. Section 16(2)(b) of the Act provides that it should be filed within 21 days from the date of the Receiving Order unless an extension has been granted by the OA. Section 16(3) of the Act provides that if the debtor fails to do so without reasonable excuse, proof of which shall lie on him, he shall be guilty of contempt of court and may be punished accordingly. There is no evidence by either the judgment debtor as a bankrupt or the OA that an extension was granted by the OA or that there was reasonable excuse for the judgment debtor's delay in filing the statement of affairs. On this point in the case of *Dato' Abdullah Hishan bin Hj Mohd Hashim v. Sharma Kumari Shukla* [2001] 5 CLJ 400; [2000] 7 MLJ 667, the court treated non-compliance of s. 16(3) of the Act as very serious and imposed a custodial sentence on the judgment debtor.
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> It is noted that s. 33(4) of the Act also provides that on proof of the facts mentioned in sub-s. 6, the court shall either refuse the order, suspend the order for a specified time, suspend the order until a dividend of not less than 50% has been paid to the creditors, or grant an order of discharge subject to such conditions aforesaid. The facts mentioned ins. 33(6) of the Act that are relevant to the present case include *inter alia*, the following:
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> Section 33(6)(d) that the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;
>
> Section 33(6)(e) that the bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculations or extravagance in living, or by recklessness, or gambling or want of reasonable care and attention to his business and affairs;
>
> Section 33(6)(m) that the bankrupt's assets are not of a value equal to 50 dollars per centum of the amount of his unsecured liabilities.

A perusal of the OA's Report showed that the bankrupt's (judgment debtor's) credit balance in his account is RM11,995.50 as compared to his debt of RM43,514.04 which is sufficient to declare dividends of approximately 17.4% to the creditors. Based on s. 33(7) of the Act the OA's Report is *prima facie* evidence. There is no evidence whatsoever from the bankrupt as to why his assets are insufficient to declare a dividend of 50%. It is therefore undisputed that the judgment debtor's assets are not of a value equal to 50 dollars per centum of the amount of his unsecured liabilities and thereby the fact as referred to in s. 33(6)(m) is proved. This would surely mean that there would be no basis whatsoever to have allowed the judgment debtor's application for an order of discharge as a bankrupt. In *Per Pathmasingam Mavilaganan ex p Public Bank Bhd* [2000] 2 CLJ 92, the court was of the opinion that the bankrupt in that case should not be discharged on account of the fact that his assets were sufficient to declare only a dividend of 31.27%. Furthermore, the judgment debtor in the instant case incurred the losses as a result of speculating on the stock market. Section 33(6)(e) refers to debts incurred as a result of speculations or gambling. There is therefore another fact in existence to prevent the unconditional discharge of the judgment debtor. From the contents of the OA's Report it is apparent therefore that the dividend declared is insufficient and is not a reasonable or fair amount to cover the debt incurred by the judgment debtor. In my view to allow the discharge of a judgment debtor on these terms will make a mockery of the execution proceedings available to creditors and of the provisions of law available to safeguard the interests of creditors. It will not only lead to a decline in business morality but will also result in great injustice to legitimate creditors.

[14] In an application of this nature, the DGI's report plays an important part in that the court relies heavily on it to exercise its discretion. That said the court is also duty-bound to examine the DGI's report and determine whether the recommendation made is one made based on a thorough investigation of the affairs of the bankrupt and the interests of the creditors. In short, the Court's role cannot be a rubber stamp of the DGI's recommendation. If the court finds that DGI's report to be lacking in details or reasonable justifications, the court is duty-bound to ignore it and cannot allow the bankrupt to take advantage of such deficiencies. Further the Bankruptcy Act 1967 through ss. 17 and 34, clearly empowers the DGI to carry out thorough investigation of the estate of the bankrupt and any failure to carry out such a statutory task would result in a dereliction of his statutory duty.

[15] In this case, there were two reports made by the DGI dated 18 June 2012 and 21 June 2012 and it is apparent to us that there was no reference to the respondent's failure to comply with s. 16(2)(b), hence there is no explanation as why such non-compliance was ignored by the DGI. In view of this omission, the respondent in fact relies on it to submit that there has not been any breach of s. 16(2)(b) as the DGI had failed to mention such offence. As stated in the above cited cases, the court under s. 33(4) is required by law to suspend any discharge. We cannot ignore this omission for the simple reason that the DGI's report by this omission is incomplete. On this ground alone, we are of the view that this appeal ought to be allowed.

[16] Further, there is no explanation by the DGI as to how the discharge of the respondent had taken the interest of the other creditors into account bearing in mind that the total sum of the indebtedness is RM1,614,658.87 (of which the appellant's share is RM732,024.97) and all that the respondent is required to pay is RM500 per month for 24 months, totalling only RM12,000 to be shared among nine creditors. Further there is no report on the respondent's earning capability. These are the complaints of the appellant.

[17] We find merit in those complaints. We are fully mindful of the fact that no individual should remain a bankrupt forever for a commercial mistake made and in an appropriate case, he or she should be given another chance in life. That said, the courts must be mindful that the DGI's report must be complete and stand up to reasonable scrutiny for the simple reason that the DGI holds a pivotal position in that he has the power to investigate the reason for the bankrupt's insolvency and his financial standing since the bankruptcy.

[18] Apart from the interest of the bankrupt, the DGI and the courts must be sensitive to the public perception on bankruptcy law in the country. The interest of the bankrupt as an individual and the interest of the public and commercial reality at large must be weighed up for the simple reason that the society at large must not have the impression that being a bankrupt is not a serious matter. We can do no better than refer to what Ramly JCA (as he then was) said in *Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals* [2010] 8 CLJ 680; [2011] 2 MLJ 218 *(supra)*:

> The public as well as commercial players should not be imbued with the perception that a person can easily borrow money (even in big amount) from financial institutions or create debts with other business creditors, then stash the money away, whether in his own name or any other persons and need not be repaid; then personally apply for a bankruptcy order against him (as in the present case) and after a short period apply for an order for a discharge with a minimum or too little dividend to be paid to the creditors, and after the discharge he can enjoy a luxury life. If this practice and perception is not checked, then commercial morality would decline. In this type of fiasco, the court and the DGI should be blamed for not carrying out their duties effectively under the bankruptcy law.

[19] Applying the guidelines set out above, we find that this is not an appropriate case to allow a discharge asked for by the respondent.

Conclusion

[20] For reasons stated above, we allowed the appeal with no order as to costs. We also ordered that the deposit to be refunded to the appellant.